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No. 04-366

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,

Petitioners,

v.

BERNARD J. EBBERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS J.P. MORGAN SECURITIES INC., *et al.*

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly concluded that the specialized bankruptcy removal statute, 28 U.S.C. § 1452(a), permits removal of claims from state court brought under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, that fall within the bankruptcy jurisdiction, notwithstanding the general anti-removal provision in Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), which ordinarily prohibits removals pursuant to the general removal provision, 28 U.S.C. § 1441(a).

LIST OF PARTIES

Respondents are: J.P. Morgan Securities Inc.; J.P. Morgan Chase & Co.; Bank of America Corp.; Banc of America Securities LLC; ABN AMRO Inc.; Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation); Deutsche Bank AG; Deutsche Banc Alex. Brown Inc. (n/k/a Deutsche Bank Securities, Inc.); Goldman, Sachs & Co.; Goldman Sachs Group, Inc.; Lehman Brothers Holdings Inc.; Lehman Brothers Inc.; Nationsbanc Montgomery Securities LLC; UBS Warburg LLC.; Citigroup Inc.; Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.); Arthur Andersen LLP; John W. Sidgmore; Clifford Alexander, Jr.; James C. Allen; Judith Areen; Carl J. Aycock; Max E. Bobbitt; Francesco Galesi; Stiles A. Kellett, Jr.; Gordon S. Macklin; John A. Porter; Lawrence C. Tucker; Juan Villalonga.

RULE 29.6 STATEMENT

Respondent ABN AMRO Incorporated is a subsidiary of ABN AMRO Holding N.V., a publicly held company. No other publicly held company has an ownership interest of 10% or more in ABN AMRO Incorporated.

Respondent Bank of America Corporation, a publicly held company, is the parent of Respondent Banc of America Securities LLC. No other publicly held company owns 10% or more of the stock of Respondent Banc of America Securities LLC.

Respondent Bank of America Corporation has no parent and no publicly held company owns 10% or more of its stock.

Respondent Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation) is a subsidiary of Credit Suisse Group, a publicly held company. No other publicly held company has an ownership interest of 10% or more in Respondent Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation).

Respondent Citigroup Inc. is a publicly traded corporation that has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Citigroup Global Markets Inc. f/k/a Salomon Smith Barney Inc. is a wholly owned subsidiary of Citigroup Financial Products Inc. f/k/a Salomon Brothers Holding Company Inc., which is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc. f/k/a Salomon Smith Barney Holdings Inc., which is a wholly owned subsidiary of Citigroup Inc.

Respondent Deutsche Bank AG has no corporate parent and no publicly held company has an ownership interest of 10% or more in it.

Respondent Deutsche Banc Alex. Brown, Inc. (n/k/a Deutsche Bank Securities, Inc.) is a subsidiary of Respondent Deutsche Bank AG, a publicly held company. No other publicly held company has an ownership interest of 10% or more in Respondent Deutsche Bank Securities, Inc.

Respondent Goldman, Sachs & Co. is a subsidiary of Respondent Goldman Sachs Group, Inc., a publicly held company. No other publicly held company has an ownership interest of 10% or more in Respondent Goldman, Sachs & Co.

Respondent Goldman Sachs Group, Inc. has no corporate parent and no publicly held company has an ownership interest of 10% or more in it.

Respondent J.P. Morgan Chase & Co., a publicly held company, is the parent of Respondent J.P. Morgan Securities Inc. No other publicly held company owns 10% or more of the stock of Respondent J.P. Morgan Securities Inc.

Respondent J.P. Morgan Chase & Co. has no parent and no publicly held company owns 10% or more of its stock.

Respondent Lehman Brothers Holdings Inc. has no corporate parent and no publicly held company has an ownership interest of 10% or more in it.

Respondent Lehman Brothers Inc. is a subsidiary of Respondent Lehman Brothers Holdings Inc., a publicly held company. No other publicly held company has an ownership interest of 10% or more in Respondent Lehman Brothers Inc.

Respondent Nationsbanc Montgomery Securities LLC is a predecessor entity to Respondent Banc of America Securities LLC.

Respondent UBS Warburg LLC is a subsidiary of UBS AG, a publicly held company. No other publicly held company has an ownership interest of 10% or more in Respondent UBS Warburg LLC.

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I

Petitioners' request that this Court to grant certiorari to review the decision by the Second Circuit holding that Securities Act claims may be removed under 28 U.S.C. § 1452(a) rests on two principal grounds. First, Petitioners assert that the decision of the Second Circuit conflicts with *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). Second, they contend that, before the Second Circuit ruled that an action may be removed notwithstanding the anti-removal provision in Section 22(a) of the Securities Act, no other court had permitted removal in the face of this statute. Both contentions are incorrect. Neither the question presented in *Breuer* nor the Court's analysis in that case bear on the issues presented here. A decades-old line of cases establishes that Securities Act claims may be removed under 28 U.S.C. § 1441(c) notwithstanding the anti-removal bar of Section 22(a). Accordingly, the main reasons offered by Petitioners for certiorari review are without merit.

Petitioners' other arguments are also unavailing. The purported conflict with district courts, for example, is not genuine. Aside from the fact that a conflict between a court of appeals and a district court generally does not warrant certiorari review, the district court opinions to which Petitioners refer are either altogether bereft of reasoning or fail to engage the Second Circuit's detailed statutory analysis. There is no conflict with this Court's precedents or among the courts of appeals. The Second Circuit's analysis is meticulous and well-reasoned. Any purported conflict should be permitted to percolate.

Finally, Petitioners' arguments to support issuance of the writ on the ground that the Second Circuit should have addressed "related to" bankruptcy jurisdiction on an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) are

without merit. Petitioners do not even present a question for this Court to consider on this issue. Moreover, the issue of "related to" bankruptcy jurisdiction here is fact-intensive and the decision to consider an issue on a Section 1292(b) appeal is subject to the court of appeals's discretion. These circumstances compel denial of Petitioners' alternative request for certiorari review.

STATEMENT OF THE CASE

A. WorldCom's Financial Troubles, the Beginning of Mass Federal Securities Litigation and Petitioners' Considered Strategy of Conducting Federal Securities Litigation in State Court

On June 25, 2002, WorldCom, Inc. – then one of the world's largest telecommunications companies – announced that it had improperly treated $3.8 billion in operating costs as capital expenditures. (*See* Petition for Writ of Certiorari ("Pet.") at 3a.) This and subsequent disclosures of WorldCom's financial accounting precipitated numerous lawsuits by purchasers of WorldCom equity and debt securities. On July 21, 2002, in the face of a torrent of lawsuits, WorldCom filed a voluntary petition for bankruptcy relief. (*See* Pet. at 39a.) As a result of this filing, all litigation against WorldCom arising out of these disclosures was stayed. (*See id.*)

Many purchasers of WorldCom securities brought their actions in federal court as putative class actions. (*See* Pet. at 3a-4a, 38a.) These actions are consolidated before the Honorable Denise L. Cote of the Southern District of New York, the venue selected by the Judicial Panel on Multidistrict Litigation (the "JPML") for coordinated proceedings for WorldCom-related securities and ERISA

litigation. (*See* Pet. at 4a, 38a.) The consolidated class action purports to represent all those who purchased WorldCom's equity and debt between April 29, 1999 and June 25, 2002.

But even though the consolidated class actions include claims on behalf of bond purchasers, a large number of sophisticated institutional investors and pension funds have commenced individual actions claiming virtually identical federal securities violations arising out of alleged purchases of WorldCom debt securities. (*See* Pet. at 5a.) Almost all of these actions were commenced in state court in jurisdictions scattered across the country. Petitioners' counsel serves as national counsel for the vast majority of these bondholder actions. Thus, these bondholder actions function effectively as the equivalent of a class action, but one consisting of a large number of individual actions in various state courts. (*See* Pet. at 5a; 43a-44a.)

Though Petitioners' actions are based exclusively on federal securities claims, their complaints have been carefully crafted to avoid federal jurisdiction. (*See* Pet. at 5a; 43a-44a.) As the court of appeals explained:

> Rather than joining a class action against Worldcom and the other defendants, the Bondholders, represented by Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss"), have brought scores of indvidual actions around the country. The Bondholders, unlike the class members do not assert claims under the Securities Exchange Act of 1934 []; instead, they bring claims exclusively under the Securities Act of 1933 []. Between July 5, 2002 and October 3, 2003, Milberg Weiss filed at least forty-seven of

> these individual actions on behalf of over 120 plaintiffs in numerous state courts.

(Pet. at 4a-5a.) By limiting their complaints to asserting claims under the Securities Act, Petitioners sought to take advantage of the anti-removal provision of Section 22(a), *see* 15 U.S.C. § 77v(a), which generally provides that no case brought under the Securities Act in a state court of competent jurisdiction may be removed to federal district court. *See id.*

Even though the Petitioners brought their claims solely under the Securities Act, the defendants they name, the claims they assert, and the facts they allege substantially overlap with what has been asserted by plaintiffs in the class actions brought in federal court. Thus, the principal focus of the allegations in the individual actions (including those brought by Petitioners) is on the conduct of WorldCom and its financial reporting practices. The centrality of WorldCom to the allegations was confirmed further by the fact that a number of the Petitioners' actions – including the action brought by lead Petitioner California Public Employees' Retirement System – initially named WorldCom as a defendant. (*See* Pet. at 43a & 43a n.13.) Therefore, although WorldCom's bankruptcy meant that it no longer was formally a party in the securities actions spawned by its financial demise, given the nature of the allegations, WorldCom's involvement in that litigation became inevitable and indispensable.

B. Individual Actions, Including Petitioners' Actions, Are Removed and Transferred by the JPML to the Southern District of New York, Where the JPML Has Centralized WorldCom-Related Securities and ERISA Litigation

Worldcom's bankruptcy permitted removal of Petitioners' actions (and other individual actions commenced in state court) pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a). Transfer of these removed actions was made possible by the JPML's order centralizing all WorldCom-related securities and ERISA litigation before Judge Cote in the Southern District of New York. The relationship of these actions to WorldCom's bankruptcy was grounded, among other things, in potential rights to statutory contribution, *see* 15 U.S.C. § 77k(f)(1), and contractual reimbursement, together with the fact of WorldCom's intimate intertwinement with the securities litigations. (*See* Pet. at 6a & 6a n.7.) Over the invariable objections of Petitioners and other individual bondholders by way of motions to remand in transferor courts and objections to transfer filed with the JPML, most actions were stayed by the transferor courts and transferred to the Southern District of New York by the JPML. In no case has the JPML declined to transfer an individual action.

In late 2002, the New York City Employees Retirement System ("NYCERS"), plaintiffs whose action had directly been removed from New York state court to the Southern District of New York, filed a motion to remand before Judge Cote. (*See* Pet. at 6a, 41a.) Many of the Petitioners intervened in the proceedings for the specific purpose of supporting the motion to remand. (*See id.* at 6a, 42a-43a.) NYCERS and Petitioners argued that removal was prohibited by the anti-

removal bar of Section 22(a), that the district court lacked "related to" bankruptcy jurisdiction, and that discretionary remand was a preferred course of conduct for the district court. On March 3, 2003, Judge Cote rejected these arguments in an opinion subsequently termed "comprehensive" by the Second Circuit (*see* Pet. at 7a) and "scholarly and thorough" by Judge Gerard E. Lynch of the Southern District of New York, *see In re Global Crossing Ltd. Sec. Litig.*, 02 Civ. 910, 02 Civ. 10199, 2003 WL 21659360, at *1 (S.D.N.Y. July 15, 2003).

Specifically with respect to the question whether removal is prohibited by Section 22(a) of the Securities Act, Judge Cote engaged in a detailed analysis of the textual and structural differences between the general removal statute, 28 U.S.C. § 1441(a), and the specific bankruptcy removal provision, 28 U.S.C. § 1452(a), and held that the anti-removal provision of the Securities Act barred removal only when removal is effectuated under § 1441(a). (*See* Pet. at 60a-71a.) This conclusion, Judge Cote continued, was supported by the bankruptcy policy of centralizing all bankruptcy-related litigation in one forum. (*See* Pet. at 68a-69a.) Interpreting removal provisions other than § 1441(a) to permit removal of Securities Act claims is hardly unprecedented. In reaching its conclusions, the district court relied on a longstanding line of cases – including Second Circuit precedent – which permits removal of Securities Act claims pursuant to 28 U.S.C. § 1441(c), notwithstanding the anti-removal provision in Section 22(a). (*See* Pet. at 69a-71a.)

After challenging Judge Cote's ruling by way of motions to reconsider, Petitioners first sought mandamus relief – which was denied (*see* Pet. at 9a) – and then requested leave to take an interlocutory appeal to the Second Circuit pursuant

to 28 U.S.C. § 1292(b). The district court certified for appeal the question whether the anti-removal bar of Section 22(a) may be overcome by the bankruptcy removal statute. (*See* Pet. at 9a.) The district court declined to certify the question whether Petitioners' actions fall within "related to" bankruptcy jurisdiction. (*See id.*) The district court's conclusions followed from the statutory criteria, which permit certification only of controlling "questions of law." 28 U.S.C. § 1292(b). Whereas the first question satisfies this statutory criterion, the second does not, among other things because it involves individual fact determinations with respect to the bases for bankruptcy jurisdiction and because there are other potential grounds for bankruptcy jurisdiction which the district court has not yet addressed. (*See* Pet. at 9a, 12a.)

The Second Circuit concurred in the district court's analysis on the questions both of accepting the appeal and the merits. The court of appeals noted that it would not exercise its discretion to review the question of "related to" bankruptcy jurisdiction because there were alternative possible bases for supporting such jurisdiction and because the issue raised was not a controlling question of law, but rather implicated the district court's factual determinations. (*See* Pet. at 12a-13a.)

On the merits, in a detailed opinion authored by Judge José A. Cabranes, the court of appeals concluded, among other things, that the text and structure of the removal statutes compel the conclusion that the anti-removal provision in Section 22(a) of the Securities Act does not preclude removal by way of the bankruptcy removal statute, 28 U.S.C. § 1452(a), even though it forbids removals sought to be

effectuated through the general removal statute, § 1441(a).[1] (*See* Pet. at 30a-34a.) Relying on this Court's precedent, the panel also addressed at length and rejected Petitioners' arguments that Section 22(a) trumps the bankruptcy removal statute because it purportedly is the more "specific" statute. (*See* Pet. at 23a-28a.) The Second Circuit also rejected the argument that Congress's enactment of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in part, 15 U.S.C. § 77v(a)), evinces an intent that removal of Securities Act claims pursuant to the bankruptcy removal provision be precluded. (*See* Pet. at 28a-30a.) Bankruptcy jurisdiction is nowhere discussed in SLUSA, and the statute nowhere suggests a Congressional intent to affect bankruptcy removals. (*See id.*)

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1. Petitioners refer to the court of appeals panel as a "two-judge panel," perhaps implying that such a panel cannot adequately speak to the issue decided. (*See, e.g.*, Pet. at 9.) The local rules of the Second Circuit specifically provide that "[t]wo judges shall constitute a quorum," 2d Cir. R. § 0.14(1), and that, where one judge from a three-judge panel is unable to continue with a matter, "the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge." *Id.* § 0.14(2). The panel of judges that heard the appeal below, moreover, was the same panel that heard Petitioners' petition for a writ of mandamus and denied the petition in part on the ground that application for review under 28 U.S.C. § 1292(b) was an adequate remedy. When seeking permission to appeal pursuant to 28 U.S.C. § 1292(b), Petitioners themselves requested that the appeal be heard by the same panel that heard Petitioners' mandamus petition on the ground that the judges were already familiar with the issues. In all events, Petitioners availed themselves fully of all available remedies in the Second Circuit; not one judge voted to rehear the case *en banc*.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Ruling That Removal Was Proper In This Case Does Not Warrant Certiorari Review

A. There is no conflict between the opinion below and this Court's precedents.

Petitioners' principal contention states that certiorari should be granted because of a purported conflict between the Second Circuit's ruling and this Court's decision in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). (*See* Pet. at 4, 9-12.) This assertion has no foundation.

The question in *Breuer* was whether the concurrent jurisdiction provision of the Fair Labor Standards Act ("FLSA"), which states that suits under the FLSA "may be maintained" in federal or state courts of competent jurisdiction, 29 U.S.C. § 916(b), bars removal under 28 U.S.C. § 1441(a). *See Breuer*, 538 U.S. at 694-95. Section 1441(a), the general removal statute, provides that civil actions over which a district court has original jurisdiction may be removed to the district court for the district where the action is pending "[e]xcept as otherwise expressly provided by Act of Congress." *See* 28 U.S.C. § 1441(a). In *Breuer*, this Court held that the statute providing that FLSA actions "may be maintained" in state courts does not constitute an "express" prohibition on removal within the meaning of Section 1441(a), particularly as compared with anti-removal provisions in other statutes, including Section 22(a) of the Securities Act. *See* 538 U.S. at 695-96.

The removal question and the authority at issue in this case are very different. The question decided by the Second Circuit was whether the specialized bankruptcy removal statute, 28 U.S.C. § 1452(a), authorizes removal of a Securities Act claim that falls within federal bankruptcy jurisdiction, notwithstanding the express prohibition on removal in Section 22(a). (*See* Pet. at 2a.) Thus, the Second Circuit accepted the premise that the express anti-removal provision in Section 22(a) of the Securities would ordinarily preclude removals under the general removal provision, Section 1441(a). (*See* Pet. at 25a-26a.) Accordingly, the question which *Breuer* resolved – i.e., whether a particular provision constitutes an "express" prohibition on removal within the meaning of Section 1441(a) – is not an issue here. The question decided by the Second Circuit, rather, is the separate and distinct one of whether, notwithstanding an express statutory prohibition on removal, removal is still authorized under Section 1452(a) because of the additional removal authority Congress granted for bankruptcy-related removals.

Not only is the question here different from that which was addressed in *Breuer*, the significant differences in the removal statutes at issue (i.e., Sections 1441(a) and 1452(a)) confirm that the analysis in *Breuer* has no bearing on this case. The language of the bankruptcy removal statute, 28 U.S.C. § 1452(a), differs variedly and markedly from that of the general removal statute, 28 U.S.C. § 1441(a). For example, the bankruptcy removal statute lacks Section 1441(a)'s qualifying language "[e]xcept as otherwise expressly provided by Act of Congress." (*See* Pet. at 25a-27a, 31a-32a.) Moreover, the bankruptcy removal statute's language is more expansive in all of its particulars, reflecting Congress's intent to vest additional removal authority so as

to permit centralization in federal court of all actions that fall within bankruptcy jurisdiction. (*See* Pet. at 26a-27a, 30a-34a.) Thus, analysis of removal by way of the bankruptcy removal statute also involves assessment of the policies underlying bankruptcy jurisdiction and the deliberately expansive scope conferred upon it by Congress, particularly in circumstances where, as here, the debtor seeks to reorganize under Chapter 11. (*See, e.g.*, Pet. at 26a-27a.)

As even this summary exposition demonstrates, this Court's decision in *Breuer* does not even begin to address, let alone resolve, the issues bearing on the question decided below. Nor is there anything in the reasoning of *Breuer* that would be suggestive of a conflict. Thus, both in terms of the questions presented and in terms of the reasoning employed, there is no basis to suggest that there is a conflict between the decision below and *Breuer*.

The sole predicate Petitioners offer to support their assertion of conflict is the statement in *Breuer* to the effect that when Congress intends to "give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms." (*See, e.g.*, Pet. at 11 (quoting *Breuer*, 538 U.S. at 697).) This statement, shorn of its context and presented in a vacuum, cannot plausibly be construed to bear on the question decided by the Second Circuit below. As the context makes clear, the Court made this statement only to demonstrate why the FLSA's provision that actions "may be maintained" in state court could not be construed as an "express" statement of non-removability within the meaning of Section 1441(a). Given that there was no mention, let alone discussion, of the specialized bankruptcy removal statute or bankruptcy policy in *Breuer*, there is no basis to conclude that this Court intended such a generalized statement to

govern the analysis of questions such as the one addressed below by the Second Circuit.

There is no conflict with this Court's precedent. Accordingly, the Petition should be denied.

B. Courts have long construed removal provisions other than Section 1441(a) to permit removal of Securities Act claims notwithstanding an express anti-removal provision.

Petitioners suggest that the Second Circuit's decision somehow has deviated from historically accepted interpretations of the Securities Act. Petitioners argue that, since its enactment, the anti-removal provision of Section 22(a) has been construed always to prohibit removal. (*See* Pet. at 9-10, 12.) Petitioners are wrong, for they fail to acknowledge a longstanding line of precedent that, contrary to their assertions, recognizes that Securities Act cases may be removed if removal is effectuated through a removal provision that contains a grant of removal power over and above the authority conferred in Section 1441(a).

Throughout their arguments, Petitioners focus almost exclusively on the language of Section 22(a), without reference to the broader context of removal statutes and their interplay. But, as the Second Circuit explained, Section 22(a) cannot be considered in a vacuum. Therefore, to answer the question whether Section 22(a) forbids removals effectuated through 28 U.S.C. § 1452(a), proper analysis must account not only for the language of *both* of these statutes, but also for the structure of the removal provisions, with a view to the different functions each removal provision fulfills. The language of Section 1441(a) and 1452(a), for instance,

differs in respects critical to the outcome of the Second Circuit's ruling. Whereas Section 1441(a) permits removal "[e]xcept as otherwise expressly provided by Act of Congress," Section 1452(a) has no such proviso. This difference in language, the Second Circuit concluded, must be intentional and must reflect Congress's intent that express anti-removal provisions do not have the same impact on bankruptcy removal that they do on general removal. (*See* Pet. at 30a-34a.) Tellingly, Petitioners do not even attempt to come to terms with this statutory analysis, preferring instead to rely on a myopic focus on the language of Section 22(a) in isolation from everything else.

Petitioners' analytical approach overlooks not only the text and structure of the removal statutes, but also longstanding precedent that undermines their contention that Securities Act claims traditionally have been considered absolutely non-removable. A line of cases addressing removal under 28 U.S.C. § 1441(c) holds, for example, that Securities Act claims may be removed notwithstanding the express bar of Section 22(a). (*See* Pet. at 33a-34a.) A seminal decision in this area was handed down over three decades ago by Judge Stapleton. *See U.S. Indus., Inc. v. Gregg*, 348 F. Supp. 1004, 1015 (D. Del. 1972), *reversed on other grounds*, 540 F.2d 142 (3d Cir. 1976). Other jurisdictions have adopted this decision, including the Second Circuit in an opinion authored by Judge Newman. *See Gonsalves v. Amoco Shipping Co.*, 733 F.2d 1020, 1021-22 (2d Cir. 1983); *see also Farmers & Merchs. Bank v. Hamilton Hotel Partners Ltd. P'Ship*, 702 F. Supp. 1417, 1420 (W.D. Ark. 1988) (noting that "[m]ost courts that have directly addressed the issue have determined that Section 1441(c) takes precedence and permits removal despite the statutory prohibition" of Section 22(a)).

As the court of appeals below explained, the principle undergirding this line of cases is that

> "when an anti-removal provision such as Section 22(a) is invoked, the threshold question is whether removal is being effectuated by way of the general removal statute, 28 U.S.C. § 1441(a), or by way of a separate removal provision that 'grants additional removal jurisdiction in a class of cases which would not otherwise be removable under the prior grant of authority.'"

(*See* Pet. at 34a.) As it has done with Section 1441(c), Congress has introduced removal power in Section 1452(a) that is over and above that which exists in Section 1441(a).

The reason why there is additional removal power in the bankruptcy removal statute may be traced back to Congress's intent that all bankruptcy litigation be centralized to the extent practicable. (*See* Pet. at 26a (discussing, *inter alia*, *Celotex Corp v. Edwards*, 514 U.S. 300, 308 (1995).) Every particular of the bankruptcy removal statute reflects this Congressional purpose. (*See* Pet. at 26a-27a.) Consequently, were Section 22(a) construed to bar removals under Section 1452(a), there would be a risk of undue interference with the bankruptcy scheme designed by Congress. (*See* Pet. at 27a.) In light of such potential interference, to adopt Petitioners' position and construe Section 22(a) to trump removals under Section 1452(a) would itself be inconsistent with analytical principles upheld by this Court. (*See* Pet. at 26a (discussing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).)

Nor, contrary to Petitioners' contentions (*see* Pet. at 10), is there *any* indication that, through enacting SLUSA, Congress intended in any way to alter the bankruptcy removal and jurisdictional scheme. (*See* Pet. at 28a-29a.) Except for conclusory assertions, Petitioners offer nothing to suggest the contrary, for SLUSA did not at all concern itself with bankruptcy issues. "Indeed, given Congress's focus in 1998 on expanding federal jurisdiction, 'it would be ironic . . . to read SLUSA . . . as implicitly contracting federal jurisdiction by reversing, without comment in either text or legislative history, the bankruptcy removal statute's effect on the prior removal scheme.'" (*See* Pet. at 29a (quoting *In re Global Crossing, Ltd. Sec. Litig.*, 2003 WL 21659360, at *3).) In the end, SLUSA is simply silent on the issue. (*See* Pet. at 29a-30a).

As the cases discussing Section 1441(c) show, Petitioners are incorrect in their assertion that the anti-removal provision in Section 22(a) of the Securities Act has never been trumped by other removal authority. (*See* Pet. at 12 (contending that "[f]or the first time in § 22(a)'s seven-decades-long existence, its express removability provision has been rendered powerless").) Here, too, Petitioners fail to make a case that certiorari is warranted.

C. Other reasons cited by Petitioners similarly do not warrant issuance of a writ of certiorari.

Petitioners also proffer, again with no developed argument, certain other purported grounds to justify certiorari review. None has merit.

1. Having been a question of first impression in the courts of appeals, Petitioners cannot point to a conflict among the courts of appeals on the question presented. Petitioners appear to contend, however, that there is a conflict

worthy of this Court's attention between the Second Circuit, on the one hand, and certain district courts, on the other. (*See* Pet. at 11.)

This Court declines to "grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit." Robert L. Stern, et al., *Supreme Court Practice* 237 (8th ed. 2002); *see also Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting). The reason, implied by S. Ct. R. 10, is that this Court seeks to establish uniformity of federal law among courts whose decisions on matters of federal law are final in the absence of this Court's review. In the first instance, the courts of appeals are charged with attempting to establish that uniformity.

This Court's general practice is particularly warranted in this instance. The district court decisions extolled by the Petitioners were handed down in the course of Petitioners' counsel's nationwide efforts to maintain the various individual actions in state court. Out of the scores of WorldCom individual actions removed from state court, only a handful were remanded. Most of these orders were summary, issued with practically no reasoning whatsoever.

The most extensive of these opinions is an unpublished decision by the district court for the Middle District of Tennessee in the case of *Tennessee Consol. Ret. Sys. v. Citigroup Inc.*, No. 3:03-0128, 2003 U.S. Dist. LEXIS 10266 (M.D. Tenn. May 12, 2003). (*See* Pet. at 20a.) The court in the *Tennessee Consolidated* case concluded that the anti-removal provision of the Securities Act trumps the

bankruptcy removal statute because it purportedly is a more "specific" statute. But, as the extended discussion in Judge Cabranes's opinion demonstrates, the *Tennessee Consolidated* decision is fundamentally flawed. (*See* Pet. at 23a-26a.)

The infirmities of the *Tennessee Consolidated* opinion are legion and include the failure to engage in a statutory analysis that addresses the text and structure of the removal statutes and their interplay with Section 22(a). The *Tennessee Consolidated* court merely asserts that Section 22(a) of the Securities Act is more "specific" than the bankruptcy removal statute. This conclusion fails properly to take account of cases such as *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). (*See* Pet. at 23a-26a.) As *Radzanower* teaches, for a statute to be considered more "specific" than another, its subject matter or area of concern must constitute a subset of the purportedly more general statute. But as the Second Circuit explained, there is no such interrelation between Section 22(a) of the Securities Act and the bankruptcy removal statute, 28 U.S.C. § 1452(a). (*See* Pet. at 25a-26a.) By the same token, the *Tennessee Consolidated* court's conclusion that SLUSA affects bankruptcy removal is unsupported. As the Second Circuit properly concluded, SLUSA simply does not speak to the issue. (*See* Pet. at 29a-30a.)

The Second Circuit cited, considered, and properly rejected the conclusions of the *Tennessee Consolidated* court.[2] And the

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2. The district court that issued this opinion has, since the Second Circuit's ruling, issued a ruling denying a motion under Fed. R. Civ. P. 60(b)(6) for relief from judgment in which it adheres to its previous analysis. *See Tennessee Consolidated Ret. Sys. v. Citigroup Inc., et al.*, No. 3:03-0128 (M.D. Tenn. Oct. 8, 2004) (unpublished memorandum and order). The court's analysis tracks the discussion in its prior ruling.

Second Circuit has not been the only court to do so. Well-reasoned district court decisions issued after the *Tennessee Consolidated* case also have rejected that decision as unsound. (*See* Pet. at 21a & 21a n.14.) As these cases confirm, the purported "split" to which Petitioners advert is illusory. The *Tennessee Consolidated* court's decision does not serve as a foundation for a legitimate conflict warranting this Court's attention, particularly when Petitioners here fail to supplement the decision with any reasoning that would call the Second Circuit's decision into question. Accordingly, any conflict among the lower courts cannot be considered ripe for purposes of this Court's review, but instead should be permitted to percolate.

2. Petitioners also appear to contend that certiorari is warranted simply because the Second Circuit decided a question of first impression concerning a significant federal statute. (*See* Pet. at 4.) But federal courts of appeals routinely decide questions of first impression concerning significant federal statutes. Ordinarily, unless there is a pressing conflict – and there is none here – or there is some other factor warranting review, the fact that an issue was one of first impression in the courts of appeals does not justify issuance of the writ. Here, moreover, the poverty of Petitioners' criticism of the Second Circuit's ruling further counsels against grant of certiorari. Under these circumstances, the best indicator of whether any genuine conflict develops is the passage of time.

3. Petitioners also suggest that certiorari is proper because the issue purportedly "affects numerous cases pending in the lower courts." (*See* Pet. at 5.) This assertion masks the reality behind the filing of the numerous individual actions. Almost all of these cases were brought by Petitioners' counsel as part of a national litigation strategy of filing individual actions to serve as mass litigation competing with the federal class and

other actions coordinated before Judge Cote. In ruling on a motion by the federal class action plaintiffs' counsel for an order to prohibit Petitioners' counsel from communicating with absent class members, Judge Cote specifically found that Petitioners' counsel had "engaged in an active campaign to encourage pension funds not to participate in the class action and instead to file Individual Actions" and that it has been "running the coordinated Individual Actions much as a *de facto* class action." *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2003 WL 22701241, at *3-*5 (S.D.N.Y. Nov. 17, 2003). Given that the purported existence of "numerous" actions is the product of a considered litigation strategy – designed to work to the detriment of the multidistrict litigation process – Petitioners are hardly in a position to contend that this multiplicity of actions is cause for issuing the writ.

II. The Second Circuit's Discretionary Refusal to Consider on an Interlocutory Appeal the Fact-Bound Question of Whether Petitioners' Securities Act Claims Fall Within "Related To" Bankruptcy Jurisdiction Does Not Warrant Certiorari Review and Petitioners Do Not Even Propose the Issue as a Question Presented

Petitioners contend that certiorari is warranted because the Second Circuit failed to review the district court's holding that Petitioners' Securities Act claims fall within "related to" bankruptcy jurisdiction. (*See* Pet. at 12-15.) None of the considerations raised in connection with this issue warrants granting the writ.

The first of many problems with Petitioners' position is that it is unclear what question they believe this Court should resolve. They offer no "question presented" on this general issue, nor is any such question apparent from their cursory discussion

of the matter. (*See* Pet. at 12-15.) Without even presenting a question, Petitioners are in no position to argue that certiorari is warranted.

The procedural posture confirms the inappropriateness of any grant of certiorari on this general point. The appeal was accepted by the Second Circuit pursuant to 28 U.S.C. § 1292(b), which, in addition to setting forth specific criteria for acceptance of appeals, leaves permission to appeal to the sound discretion of the court of appeals. No issue arising from the Second Circuit's grant of permission to appeal warrants certiorari review. The Second Circuit declined to entertain the "related to" bankruptcy jurisdiction issue on the interlocutory appeal because its fact-intensive nature disqualified it as a "controlling question of law." (*See* Pet. at 12a-13a.) Whether a court of appeals abuses its discretion under Section 1292(b) in declining to hear a fact-intensive jurisdictional issue on an interlocutory appeal is an issue that does not warrant certiorari review.

Petitioners' arguments suggest also that they believe that the court of appeals abused its discretion by failing to reach the "related to" bankruptcy jurisdiction issue even though the issue was technically within the four corners of the order that was being reviewed. (*See* Pet. at 13.) Under *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), and its kindred, a court of appeals has the discretion – but certainly not the obligation – to reach issues that are fairly within the certified order other than the controlling question that is the principal subject of the appeal. *See id.* at 205. How that discretion is employed in any given case – particularly when it involves a fact-intensive jurisdictional issue that, at best, would necessitate a remand for further fact-finding – is not a proper subject for this Court's review.

Nor can this conclusion be overcome by Petitioners' assertion that subject matter jurisdiction is invariably the first order of a federal court's business. (*See* Pet. at 12, 14.) Petitioners' assertion is an incorrect statement of the principle of cases such as *Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83 (1998).

In *Steel Co.*, this Court directed its criticism to the doctrine of "hypothetical jurisdiction," whereby courts would assume the existence of federal jurisdiction and then decide a case on the merits if the jurisdictional issues were particularly difficult and the merits issues were straightforward. *See* 523 U.S. at 101. Thus, *Steel Co.* indicated that federal courts, being courts of limited jurisdiction, must address subject matter jurisdiction before fully adjudicating the merits of the case. *See id.*

But while federal courts must be cautious about adjudicating the merits before determining subject matter jurisdiction, this principle "does not dictate a sequencing of jurisdictional issues." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). The question in *Ruhrgas* was whether, in a case removed from state court, a federal district court could adjudicate personal jurisdiction before addressing subject matter jurisdiction. This Court held that it could, remarking that "there is no unyielding jurisdictional hierarchy" with respect to deciding threshold jurisdictional matters. *Id.* at 578.

Thus, Petitioners' contention that subject matter jurisdiction must always be decided as a matter of first priority in all postures is incorrect on its own terms. Moreover, Petitioners' assertion is very much incorrect in the context of a § 1292(b) appeal, where appellate jurisdiction and the propriety of what appears before the court of appeals is governed by specific statutory criteria. In this case, the court of appeals concluded that only

the question of removal jurisdiction satisfied the statutory criteria; accordingly, it was entirely appropriate for the court of appeals to reach only that issue on the interlocutory appeal. No merits question was presented in the certified orders and no merits issue was decided by the Second Circuit. In light of the manner in which 28 U.S.C. § 1292(b) delimits appellate jurisdiction, and of the discretion afforded to the court of appeals both by the doctrine of *Ruhrgas* and *Steel Co.* and by § 1292(b), the Second Circuit was well within its compass not to reach the "related to" bankruptcy jurisdiction issue. None of the cases to which Petitioners point are to the contrary (*see* Pet. at 12-14); they all stand for the settled proposition – irrelevant here – that, generally, subject matter jurisdiction must be decided before a federal court permits itself to fully adjudicate the merits. Issuance of the writ to review the Second Circuit's treatment of the "related to" bankruptcy jurisdiction issue is unwarranted.[3]

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3. The decisions cited by Petitioners apparently in an effort to suggest a split in authority are not to the contrary. For instance, *Larsen v. Senate of Pennsylvania*, 152 F.3d 240 (3d Cir. 1998), the case upon which Petitioners heavily rely, simply articulates the general rule that, before engaging the full merits, a federal court must examine whether it has the power to do so. *Larsen* involved a dispute between a judge whom the legislature had removed from office and the legislators who had effectuated the removal. The judge had sued the legislators on the theory that they had deprived him of a constitutionally protected property interest; the legislators claimed absolute immunity from suit, but also argued that, as a threshold matter, the judge's claim was nonjusticiable. *See id.* at 245. The district court denied the legislators' attempt to dismiss on nonjusticiability grounds, but then certified the property interest question for interlocutory appeal without certifying the justiciability issue. *See id.* The Third Circuit simply concluded that before it could decide the property interest question on the merits, it was obligated to determine justiciability. *See id.* at 245-46. There is no inconsistency between *Larsen* and the decision of the court of appeals below.

CONCLUSION

For the foregoing reasons, the Petition should be denied in its entirety.

Respectfully submitted,

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